A

AGATHA FOO TET SIN & ANOR v. ULTIMATE ESSENCE SDN BHD & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
AZAHAR MOHAMED JCA
MOHD ZAWAWI SALLEH JCA
B BADARIAH SAHAMID JCA
[CIVIL APPEALS NO: W-02(NCVC)(A)-1114-07-2014, W-02(NCVC)(A)-1120-07-2014 & W-02(NCVC)(A)-7-01-2014]
7 JULY 2015

C ***LAND LAW:*** *Caveats – Caveatable interest – Application to remove caveats – Developer sold lots of land to purchasers – Land not subdivided and individual titles not issued by Land Office – Purchasers lodged private caveats on respective lots – Developer went into liquidation and sold land to respondent – Respondent applied for removal of private caveats – Whether respondent an aggrieved person – Whether* D *purchasers had caveatable interest for caveat to subsist – National Land Code, ss. 323(1) & 327(1)*

MK Associates ('MKA') was the developer of Serendah Golf Resort ('SGR'). SGR was built on several pieces of land including two of which MKA was the registered owner. The said land was not subdivided and individual titles E had not been issued by the land office. MKA sold Lots 16, 17 and 18 ('the said lots') to the appellants ('the defendants'), namely, Agatha Foo, Ong Hong Thong and Ng Kam Poh. After paying the full purchase price and receiving vacant possession, the defendants lodged private caveats on their respective lots pending issuance of individual titles. Subsequently MKA F went into liquidation and sold the said land to the respondent ('the plaintiff'). The plaintiff applied *inter alia*, for the removal of the private caveat or alternatively for the defendants to issue a letter of consent allowing for the transfer of the said lands into the plaintiff's name. The plaintiff's application against Agatha Foo ('Agatha's case') and Ong Hong Thong ('Ong's case') G were heard together and allowed. The Judicial Commissioner ('JC') made a finding that the plaintiff, as the purchaser of the said land, was an aggrieved person under s. 327(1) of the National Land Code ('NLC') and had caveatable interest under s. 323(1) of the NLC. However, the plaintiff's application against Ng Kam Poh ('Ng's case') was dismissed on the ground that Ng had a statutory right to enter the private caveat as he had a registrable H and/or caveatable interest. Hence, the present appeals. The three appeals were heard together as they arose out of the same factual matrix and the legal issues were similar. The issue that arose for the court's determination was whether the defendants had caveatable interest for the caveat to subsist.

I

Held (allowing appeal in Ng's case and dismissing appeals in Agatha's case and Ong's case)
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) The balance of convenience favoured the removal of the caveats. The caveats lodged by the defendants over their respective lots did not affect any other part of the land. In all these caveats, Form 16B and statutory declaration clearly described and identified the caveator's interest in the part of the land that the caveators sought to protect. Therefore, there was no necessity to remove the private caveats or for the defendants to give consent for the purpose of transfer of the said land to the plaintiff or for the subdivision of the said land. (paras 34 & 45)

(2) The JC in Agatha's case and Ong's case failed to consider sub-s. 322(5A) of the NLC which in effect, provides that no consent of the caveator was required in respect in respect of transaction not affecting the part of the land. (para 35)

(3) The subdivision exercise would not only benefit the defendants but would also benefit the hundreds of parcel owners who claimed an interest in parcels of the said land, who, like the defendants, had been waiting for more than 20 years for the subdivision of the said land and for the issuance of separate individual titles to the parcels without any sign of progress. (para 44)

Bahasa Malaysia *Translation Of Headnotes*

MK Associates ('MKA') merupakan pemaju Serendah Golf Resort ('SGR'). SGR dibina atas beberapa bidang tanah, termasuk dua yang mana MKA merupakan pemilik berdaftarnya. Tanah tersebut tidak dipecah bahagi dan hak milik individu tidak dikeluarkan oleh Pejabat Tanah. MKA telah menjual Lot 16, 17 dan 18 ('lot-lot tersebut') kepada perayu-perayu ('defendan-defendan'), khususnya, Agatha Foo, Ong Hong Thong dan Ng Kam Poh. Selepas membayar harga belian penuh dan menerima milikan kosong, defendan-defendan memasukkan kaveat persendirian ke atas lot masing-masing sementara menunggu pengeluaran hak milik individu. Kemudian, MKA dibubarkan dan telah menjual tanah tersebut kepada responden ('plaintif'). Plaintif telah memohon, antara lain, untuk pembatalan kaveat-kaveat tersebut atau secara alternatif untuk defandan-defendan mengeluarkan surat kebenaran untuk membolehkan pindah milik lot-lot tersebut kepada nama plaintif. Permohonan plaintif terhadap Agatha Foo ('kes Agatha') dan Ong Hong Thong ('kes Ong') dibicarakan bersama dan dibenarkan. Pesuruhjaya Kehakiman ('PK') membuat dapatan bahawa plaintif, sebagai pembeli tanah tersebut, merupakan orang yang terkilan di bawah s. 327(1) Kanun Tanah Negara ('KTN') dan mempunyai kepentingan yang boleh dikaveat di bawah s. 323(2) KTN. Walau bagaimanapun,

permohonan plaintif terhadap Ng Kam Poh ('kes Ng') ditolak atas alasan bahawa Ng mempunyai hak statutori untuk memasukkan kaveat persendirian kerana dia mempunyai kepentingan yang boleh didaftarkan atau dikaveatkan. Oleh itu, rayuan-rayuan ini. Ketiga-tiga rayuan ini dibicarakan bersekali kerana kesemuanya berbangkit daripada fakta matrik dan isu-isu perundangan adalah serupa. Isu yang berbangkit bagi pemutusan mahkamah adalah sama ada defendan-defendan mempunyai kepentingan yang boleh dikaveat agar kaveat dikekalkan.

Diputuskan (membenarkan rayuan dalam kes Ng dan menolak rayuan-rayuan dalam kes Agatha dan kes Ong)

Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

(1) Imbangan kebarangkalian berat kepada pembatalan kaveat. Kaveat yang dimasukkan oleh defendan-defendan ke atas lot masing-masing tidak memberi kesan kepada bahagian lain tanah tersebut. Dalam kesemua kaveat, Borang 16B dan akuan berkanun jelas menerangkan dan mengenal pasti kepentingan pembuat kaveat dalam bahagian tanah yang ingin dilindungi oleh pembuat kaveat tersebut. Oleh itu, tiada keperluan untuk membatalkan kaveat persendirian atau bagi defendan-defendan memberi kebenaran bagi tujuan pindah milik tanah kepada plaintif atau pecah bahagian tanah tersebut.

(2) PK dalam kes Agatha dan kes Ong gagal mempertimbangkan sub-s. 322(5A) KTN yang mana, secara kesannya, memperuntukkan bahawa kebenaran oleh pembuat kaveat tidak diperlukan bagi transaksi yang tidak melibatkan bahagian tanah tersebut.

(3) Langkah pecah bahagian bukan sahaja akan memanfaatkan defendan-defendan tetapi juga akan memanfaatkan ratusan pemilik bahagian yang menuntut kepentingan ke atas bahagian-bahagian dalam tanah tersebut yang mana, seperti defendan-defendan, telah menunggu lebih 20 tahun bagi pecah bahagian tanah tersebut dan bagi pengeluaran hak milik individu ke atas bahagian-bahagian tanpa sebarang tanda-tanda progres.

Case(s) referred to:

American Cyanamid Co v. Ethicon Ltd [1975] AC 396 ***(refd)***

Australian Property & Management Pty Ltd v. Devifi Pty Ltd [1996] NSWSC 86 ***(refd)***

Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 PC ***(refd)***

Films Rover International Ltd v. Cannon Film Sales Ltd [1987] 1 WLR 670 ***(refd)***

Hassan Kadir & Ors v. Mohamed Moidu Mohamed & Anor [2011] 5 CLJ 136 FC ***(refd)***

Kundang Lakes Country Club Bhd v. Garden Master (M) Sdn Bhd [1999] 2 CLJ 633 CA ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor [1995] 2 CLJ 713 CA ***(refd)***

Mosbert Bhd (In Liquidation) v. Stella D'Cruz [1985] 1 LNS 47 FC ***(refd)***

Re Burman's Caveat [1994] 1 Qd R 123 ***(refd)***

Re Jorss' Caveat [1982] Qd R 458 ***(refd)***
Temenggong Securities Ltd & Anor v. Registrar of Titles Johore & Ors [1974] 1 LNS 175 FC ***(refd)***
Yeong Ah Chee v. Lee Chong Hai & Anor And Other Appeals [1994] 3 CLJ 20 SC ***(refd)***

Legislation referred to:
National Land Code, ss. 136(1)(e), 322(2), (5A), 323(1), 327(1)

Other source(s) referred to:
Judith Sihombing, *The National Land Code, A Commentary*, Kuala Lumpur; Malayan Law Journal, Singapore: 1992, paras 2404 & 3301.1

(Civil Appeal No: W-02(NCVC)(A)-1114-07-2014)
For the appellants - Yvonne Raj (Yoshini Murugiah with her); M/s Jerald Gomez Assocs
For the respondent - Malik Imtiaz (Satharuban, Mahathir Abdullah & Chan Wei June with him); M/s Leela A Sanghrajka & Assocs

(Civil Appeal No: W-02(NCVC)(A)-1120-07-2014)
For the appellant - Yvonne Raj (Yoshini Murugiah with her); M/s Jerald Gomez Assocs
For the respondent - Malik Imtiaz (Satharuban, Mahathir Abdullah & Chan Wei June with him); M/s Leela A Sanghrajka & Assocs

(Civil Appeal No: W-02(NCVC)(A)-7-01-2014)
For the appellant - Malik Imtiaz (Satharuban, Mahathir Abdullah & Chan Wei June with him); M/s Leela A Sanghrajka & Assocs
For the 1st respondent - Yvonne Raj (Yoshini Murugiah with her); M/s Jerald Gomez Assocs
For the 2nd respondent - Salwati Umar; FC

[Appeal from High Court, Kuala Lumpur; Civil Suits No: 24NCVC-570-03-2013, 24NCVC-566-03-2013 & 24NCVC-571-03-2013]

Reported by Najib Tamby

JUDGMENT

Mohd Zawawi Salleh JCA:

Introduction

[1] There were three appeals before the court, two from the decision of Rosilah binti Yop JC (as she then was) in Appeal No. W-02(NCVC)(A)-1114-07-2014 (*Agatha*'s case) and Appeal No. W-02(NCVC)(A)-1120-07-2014 (*Ong*'s case) and one from the decision of Lee Heng Cheong JC (as he then was) in Appeal No. W-01(NCVC)(A)-7-01-2014 (*Ng Kam Poh*'s case).

[2] On 16 July 2014, YAA President of the Court of Appeal directed that these three appeals be heard together as they arose out of the same factual matrix and the legal issues raised were similar. Also, the parties were the same in the three appeals.

[3] At the conclusion of the submissions, we unanimously dismissed the appeals in respect of *Agatha*'s case and *Ong*'s case and allowed the appeal in respect of *Ng Kam Poh*'s case with costs.

[4] We are now rendering a common judgment pertaining to these appeals.

[5] For convenience, will refer to the parties as they were referred to in the High Courts.

Brief Background Facts

[6] For the brief background facts to these appeals, we cannot improve upon that provided by learned counsel for the defendants/appellants in *Agatha*'s case and *Ong*'s case and the defendant/respondent in *Ng Kam Poh*'s sase in their skeleton submission (hujahan ringkas), pp. 1 - 4. The brief background facts are in these terms:

> 4. M.K. Associates Sdn. Bhd (Company No. 092826H) ("MKA"), is the developer of a project known as Serendah Golf Resort.
>
> 5. Serendah Golf Resort was built on several pieces of land including H.S.(D) 4329 (formerly known as H.S.(D) 2050), P.T. 1391 and H.S.(D) 2052 PT 1393 in Mukim Serendah, Daerah Ulu Selangor, Negeri Selangor ("the said Land").
>
> 6. MKA is the registered owner of the said Land.
>
> 7. The said Land has not been subdivided and individual titles have not been issued by the relevant Land Office.
>
> 8. MKA sold several hundred lots to various purchasers including:
>
> (i) Lot No. 16 Serendah Golf Villa Phase 2 ("Lot 16") on 25.3.1992 to Agatha Foo and Loh Kee Wey (TAB C page 35 - Core Bundle).
>
> (ii) Parcel No. 108 ("Lot 108") to Ong Hong Thong on 17.9.1992.
>
> (iii) Lot No. 17 Serendah Golf Villa Phase 2 ("Lot 17") on 12.11.1991 to the 1st Purchaser who sold it to Ng Kam Poh on 27.1.1995.
>
> Lot 16, Lot 17 and Lot 108 ("the said Lots") all from part of the said Land.
>
> 9. The Defendants paid the full purchase price for the said Lots. MKA delivered vacant possession of the said Lots to each of the Defendants in the early 1990s.
>
> 10. In March 2011, each of the Defendants lodged a private caveat on their respective Lots; the caveat bearing Presentation No. 10079/2011 lodged on 07.03.2011 over Lot 16 (TAB D page 56-58 - Core Bundle), Presentation No. 13947/2011 lodged on 25.03.2011 over Lot 108 (TAB D page 59-61A - Core Bundle) and Presentation No. 13946/2011 lodged on 25.3.2011 over Lot 17 (TAB D page 62-65 - Core Bundle) (collectively "the Private Caveats") to protect their interest, rights and title in the said Lots pending issuance of the individual title.

11. MKA has never challenged any of the Defendants' absolute right to their respective Lots.

12. MKA went into liquidation. The Liquidator has never challenged any of the Defendants' absolute right to their respective Lots.

13. On 19.4.2012, MKA entered into a Sale and Purchase Agreement to sell the said Land and 8 other pieces of land to the Plaintiff ("the Land's SPA") (TAB E page 66 - Core Bundle).

14. The Plaintiff applied by way of Originating Summons for *inter alia* the removal of the Private Caveats or alternatively for the Defendants to issue a letter of consent allowing for the transfer of the said Land into the Plaintiff's name and for their application to subdivide the said Land.

15. On 18.12.2013, the Learned Judge Rosilah binti Yop heard *Agatha*'s Case and *Ong*'s Case together and allowed the Plaintiff's application against the Defendants with costs. The learned Judge made a finding that the effect of the Private Caveats was to prevent or prohibit the transfer of the said Land from MKA to the Plaintiff and the transfer thereafter to the beneficial owners of the respective parcels, and the subdivision of the Master Title.

16. On the same day, the learned Judge Lee Heng Cheong, hearing *Ng Kam Poh*'s Case, dismissed the Plaintiff's application with costs, making a finding that section 322(5A) and 136(1)(e) of the National Land Code 1965 (NLC) are directly applicable to the facts and there was no need for the private caveat to be removed or for the Defendant to grant consent as the caveat does not prevent the transfer and the requisite registration of the said Land (excluding the said Lots) from MKA to the Plaintiff and sub-division of the said Land.

Findings Of The High Courts

Agatha's Case And Ong's Case

[7] The learned JC only wrote one ground of judgment for both cases. The court was informed by learned counsel for the defendants that the said ground of judgment were applicable to both appeals as the both cases arose out of the same facts and the legal issues raised were the same.

[8] The learned JC decided in favour of the plaintiff. Her Ladyship's principal reasons for so deciding may be summarised as follows:

(a) The plaintiff was an aggrieved person within the meaning of s. 327(1) of the NLC as the plaintiff was the purchaser of said land and had paid the purchase price in full. The plaintiff possessed a caveatable interest under s. 323(1) of the NLC;

(b) The defendants lodged the caveats to protect their interests pending the issuance of a separate individual title to the parcel. The defendants have not taken any steps whatsoever to facilitate the subdivision from taking place;

(c) The private caveat has the effect of preventing or prohibiting the transfer of the said land from MKA to the plaintiff and subdivision of the said land;

(d) Following the three stage test as set out in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor* [1995] 2 CLJ 713; [1995] 1 MLJ 719, the learned JC found that there was no serious issues to be tried and the interest of the parcel owners in obtaining separate individual titles to their parcels outweighed the concerns of the defendants that the plaintiff may deal with the parcels in a manner contrary to their interests.

Ng Kam Poh's Case

[9] In rejecting the application to remove and cancel the caveat, the learned JC held that:

(a) The first defendant has a statutory right to enter the private caveat as he has a registrable and/or caveatable interest;

(b) MKA/the liquidator only held the bungalow lot as a bare and/or contractual trustees for the first defendant;

(c) There was no necessity to remove the private caveat or for the first defendant to give consent for the purpose of transfer of the said land (excluding the bungalow lots) to the plaintiff or for subdivision of the said land as the private caveat was lodged against a described and identified part of the said land, namely the bungalow lots only. As such, s. 322(5A) is directly applicable to the factual matrix of the case.

(d) The private caveat did not prevent the process of transfer;

(e) There is no provisions in the NLC which stipulates that a caveator of a land is required to remove his caveat or to give consent in writing for the transfer of the plaintiff's interest in other parts of the said land; and

(f) There is no obligation on the part of the first defendant to commence any legal action against MKA/the liquidator to enforce his right, interest and title to the bungalow lots as MKA had acknowledged that the first defendant has absolute beneficial interest to the bungalow lots. MKA had submitted the first defendant's name and particulars to Majlis Daerah Hulu Selangor for the purpose of issuance of the assessment notice for the bungalow lot directly to the first defendant.

Summary Of The Defendants' Submissions

[10] The nub of the defendants' submission is that the High Court's decision in *Agatha*'s case and *Ong*'s case should be set aside and the High Court's decision in *Ng Kam Poh*'s case should be affirmed.

[11] It was the contention of the defendants that the onus is on the plaintiff, being someone other than the registered proprietor, to satisfy the court that it is a body aggrieved by the existence of the caveat. (See *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18; [1979] 2 MLJ 212).

[12] The defendants strenuously argued that s. 322(2) and its proviso read together with ss. 323, 322(5A) and 136(1)(e) of the NLC makes it expressly clear that there is no need for the removal of such a caveat as it does not affect the transfer of any other part of the said land. Further, in an application for subdivision of the whole land, there is no need to obtain the consent of the owner who lodges a caveat.

[13] The defendants posited that the learned JC in *Ng Kam Poh*'s case had canvassed all the relevant provisions in the NLC and the applicable authorities and rightly applied those provisions to the factual matrix of the case.

Summary Of The Plaintiff's Submissions

[14] In considering the plaintiff's application, the learned JC had adopted the correct approach as set out in the case of *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor* [1995] 1 MLJ 719 (*Luggage Distributor*'s case).

[15] The learned JC was right when Her Ladyship rejected the contention of the defendants that the caveat was only lodged in relation to the parcel and not in relation to the whole land. Her Ladyship's finding was supported by the express content of the borang B and its schedule. The schedule described the land affected by the caveat in question. Consequently, pursuant to s. 322(2) of the NLC, the effect of the caveat is, *inter alia*, to prohibit the registration, endorsement or entry of any instrument of dealing and any certificate on the register document of title.

[16] The learned JC was also correct in holding that the existence of the caveat prevented the subdivision of the said land. This was because the subdivision of the said land was predicated upon the transfer of the said land from the MKA to the plaintiff.

[17] The learned JC had properly exercised her discretion and correctly weighted the competing interests involved when Her Ladyship granted the plaintiff's application.

[18] Finally, the plaintiff submitted that the learned JC had correctly ordered the removal of the caveat to facilitate the transfer of the said land from MKA to the plaintiff and the subsequent process of subdivision and issuance of separate individual titles.

Our Decision

Legal Principles

[19] The legal principles in relation to applications to remove caveats are well established. Section 327(1) of the NLC confers a discretion to the High Court to remove a caveat. Following *obiter* comments from the Privy Council case of *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212, Gopal Sri Ram JCA (as he then was) stated in *Luggage Distributor*'s case *(supra)* that in considering an application for the removal of a caveat, the procedure to be adopted should be a simple and summary one. At the first stage, the court will examine the grounds expressed in the application for the caveat to see whether they show a caveatable interest. Once the court is satisfied that the caveator's claim amounts in law to a caveatable interest, it must then go on to consider whether the claim discloses a serious question meriting a trial. After these two stages have been crossed, the court must decide where the balance of convenience lies.

[20] The analogy of the application to remove caveat with interlocutory injunction applications can be gleaned from the following passage from Lord Diplock in *Eng Mee Yong (supra)*:

> The caveat under the Torrens system has often been likened to a statutory injunction of an interlocutory nature restraining the caveatee from dealing with the land pending the determination by the court of the caveator's claim to title to the land, in an ordinary action brought by the caveator against the caveatee for that purpose. Their Lordships accept this as an apt analogy with its corollary that caveats are available, in appropriate cases, for the interim protection of rights to title to land or registrable interest in land that are alleged by the caveator but not yet proved.

[21] Lord Diplock went on to state that the court's power to grant such an injunction, and similarly the order for removal of a caveat, is discretionary and that the guiding principles are the "balance of convenience". In this regard His Lordship said:

> there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the court that there is a 'probability', a '*prima facie* case' or 'a strong *prima facie* case' that if the action goes to trial, he will succeed; but before any question of a balance of convenience can arise, the party seeking the injunction must satisfy the court that his claim is neither frivolous or vexatious; in other words that the evidence before the court discloses there is a serious question to be tried.

[22] Lord Diplock cited the case of *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396 as authority for that proposition. A

[23] In *Re Burman's Caveat* [1994] 1 Qd R 123, the Queensland Court of Appeal held, applying the decision in *Re Jorss' Caveat* [1982] Qd R 458, that there was no sufficient reason to depart from the principle that the position of a caveator should be considered as equivalent to that of an applicant for an interlocutory injunction in the context of an application for removal of a caveat. B

[24] Accordingly, to resist an application to remove a caveat, the caveator must show on the evidence: C

(a) the caveator has "caveatable interest" in the land;

(b) a serious question to be tried in the "interest" claimed; and

(c) that the balance of convenience favours the continuation of the caveat.

[25] Further, the onus is the caveator to show why the caveat should not be removed. The caveator must show that the caveat has not been lodged frivolously or for an improper purpose. D

Caveatable Interest

[26] It is pertinent to note that the foremost issue which the court must address in cases relating to caveat is whether the caveator has caveatable interest for the caveat to subsist (See *Kundang Lakes Country Club Bhd v. Garden Masters (M) Sdn Bhd* [1999] 2 CLJ 633 (CA)). E

[27] Upon a scrutiny of the evidence on record, we were of the view that there was more than ample evidence to conclude that the defendants have caveatable interest in the said land. The defendants entered into the bungalow lot's SPA and paid their respective full purchase price. MKA has delivered vacant possession of the bungalow lots to the defendants and the defendants had been in possession the same since 1995. In such circumstances, MKA/ the liquidators held the bungalow lots as a bare trustees and/or constructive trustees for the defendants. (See *Temenggong Securities Ltd & Anor v. Registrar of Titles Johore & Ors* [1974] 1 LNS 175 (FC); *Yeong Ah Chee v. Lee Chong Hai & Anor And Other Appeals* [1994] 3 CLJ 20 (SC); *Hassan Kadir & Ors v. Mohamed Moidu Mohamed & Anor* [2011] 5 CLJ 136 (FC)). F G

Width Of Caveat H

[28] The plaintiff contended that the caveats lodged by the defendants were wider than was necessary to protect their interests in the said land. The caveats were not only lodged in relation to the parcel but also in relation the whole land as borne out by the borang B and its schedule, which is a schedule describing the land affected by the caveats in question. In the schedule, the caveats were expressed to bind the whole lot No. PT 1391, H.S.(D) No. 4329, with the use of the word "kesemua". (See p. 196 AR Jilid 2(I)). I

[29] In support of the submission, the plaintiff referred us to the case of *Mosbert Berhad (In Liquidation) v. Stella D'Cruz* [1985] 1 LNS 47; [1985] 2 MLJ 446 where the Supreme Court held that the caveat was intended to forbid the registration of any dealing affecting the whole land and was not confined to private lot No. 460 only (being the lots identified by the caveator in the grounds of the caveat).

[30] The plaintiff posited that in view of the extent of the caveats, the plaintiff would be prevented from transferring the said land from MKA to the plaintiff and would also prevent the subsequent transfer of any separate individual titles from the plaintiff to the individual parcel owners.

[31] Now, the proviso to s. 322 of the NLC as amended says:

> Provided that where the claim is in respect of a part of the land, the caveat binds the whole land and where the claim is in respect of an undivided share of the land, the caveat binds the whole of the undivided share in the land.

[32] Subsection (5A) of the NLC states:

> (5A) No consent of the person or body at whose instance a private caveat has been entered on a part of the land, an undivided share in the land or a particular interest therein is necessary to effect any registration, endorsement of entry of any instrument on the register document of title not affecting the claim relating to that part of the land, undivided share in the land or interest therein.

[33] To our mind, the words of the sub-s. 322(5A) of the NLC are clear and unambiguous and give rise to no controversy. The effect of subsection is that a caveat to bind part of the land or undivided share only, actually binds the whole of the land or undivided share. However, when an application to effect registration of competing interest or entry of a competing interest is made, no consent is required in respect of a transaction not affecting that part of the land. (See *The National Land Code, A Commentary* by Judith Sihombing, Kuala Lumpur; Malayan Law Journal, Singapore: 1992, para. [2404] and [3301.1].

[34] Applying the above cited authorities, we were of the view that the caveats lodged by the defendants over their respective bungalow lots did not affect any other part of the land. In all these caveats, the form 19B and statutory declaration clearly described and identified the caveator's interest in the part of the land that the caveators sought to protect. Therefore, there was no necessity to remove the private caveats or for the defendants to give consent for the purpose of transfer of the said land (excluding the bungalow lot) to the plaintiff or for the subdivision of the said land.

[35] We agreed with the defendants' contention that the learned JC in *Agatha*'s case and *Ong*'s case failed to consider the sub-s. 322(5A) of the NLC which in effect provides that no consent of the caveator was required in

respect of a transaction not affecting the part of the land. The form 19B and the statutory declaration accompanying the form clearly identified the said land as the part of the land sought to be caveated.

[36] That, however, is not the end of the matter. We have to consider whether the balance of convenience favours the continuation of the caveats. The balance of convenience is an independent criterion in assessing an application for removal of a caveat. As such, the balance of convenience may justify a court to order the removal a caveat notwithstanding the existence of a "serious question" to be tried.

[37] In this connection, the defendants must show that the balance of convenience favours the caveats to remain. To do this, the defendants should show the detriment they would suffer, preferably irreparable, if the caveats were removed.

[38] It is not possible to exhaustively define factors which may be taken into account in determining the balance of convenience. For the purpose of these instant appeals, factors which are relevant include:

(a) whether the caveator's rights may be protected by a substitute or alternative security;

(b) whether the plaintiff is being prevented by the caveat from a legitimate exercise of its rights; and

(c) whether the plaintiff will suffer loss or hardship if the caveat is not removed;

Alternative Security

[39] The plaintiff, having purchased the said land, has an obligation to proceed with the subdivision of the said land, the application for subdivision and the subsequent transfer of the separate individual titles to the respective parcel owners, including the defendants, within a prescribed period. (See paras. (a) to (f), Sch. 2 of the Land Purchase SPA, p. 237 AR, Jilid 2(I)).

[40] By way of originating summons, the plaintiff sought an order for the removal of the caveats and an order that the defendants issue written consent to the transfer of the said land from MKA to the plaintiff.

[41] The plaintiff had also offered to issue an undertaking to proceed with subdivision of the said land and thereafter to transfer the separate individual titles to the respective parcel owners, including the defendants.

[42] In the course of a meeting between representatives of the plaintiff, purchasers of parcels in the said land and the Director of the Pejabat Tanah dan Galian Selangor ("PTG"), Dato' Kamarul Zaman bin Jamil on 17 June 2013, the PTG had even proposed to enter a Registrar's caveat on the said land, providing blanket protection to all parties claiming an interest in

parcels of the land, pending the subdivision process, which proposal was acceptable to the plaintiff, as it would facilitate the subdivision exercise. (See paras. 3 to 7, pp. 90 and 91 AR Jilid 2(I) and pp. 363 to 364 AR Jilid 2(II)).

[43] It would appear that the plaintiff was encountering problems with the relevant land office in transferring the said land from MKA to the plaintiff. The problem was due to the position maintained by the Pendaftar Hakmilik Negeri Selangor that the caveats in question bound the entire land.

[44] In the circumstances, we were of the view that the subdivision exercise would not only benefit the defendants but would also benefit the hundreds of parcel owners who are claiming an interest in parcels of the said land, who, like the defendants, have been waiting for more than 20 years for the subdivision of the said land and for the issuance of separate individual titles to the parcels without any sign of progress.

[45] Having regard to fact that the removal of the caveats would not lead to the extinguishing of the defendants' interests in the said land, we were of the firm view that the balance of convenience favoured the removal of the caveats. In *Australian Property & Management Pty Ltd v. Devifi Pty Ltd* [1996] NSWSC 86; [1997] 7 BPR 15 235 at 15.257, the court had this to say:

> [T]he Court has said in cases such as *Mrtyn v. Glenan* that it will not allow caveats, even if they are legitimate caveats, to oppress the registered proprietor unduly. The Court does not live in some commercial vacuum.
>
> The Court knows that the mere presence of a caveat may prevent a whole series of *bona fid*e commercial transactions taking place and if a case gets into that sort of area the Court will be extremely careful as to whether the caveat should be retained. An example is *Re Clements Caveat* [1981] Qd R 341. If in such a circumstance a substitute security can be given then the court is often minded to order that the caveat be removed.

[46] We have to remind ourselves that the fundamental principle is that the court should take whatever course appears to carry the lower risk of injustice if it should be turn out to have been "wrong". (See *Films Rover International Ltd v. Cannon Film Sales Ltd* [1987] 1 WLR 670, per Lord Hoffman).

Conclusion

[47] For the foregoing reasons, we dismissed the appeals in *Agatha*'s case and *Ong*'s case and allowed the appeal in *Ng Kam Poh*'s case with costs in the sum of RM30,000. We made no order as to costs to the Pendaftar Hakmilik Negeri Selangor. Deposits refunded.